

DATE

Paul D. Escott  
Assistant City-Parish Attorney  
Lafayette Legal Department  
P.O. Box 80338  
Lafayette, Louisiana 70598

Re: **Louisiana Board of Ethics**  
**Docket No. 2021-882C**

Dear Mr. Escott,

The Louisiana Board of Ethics, at its meeting on January 7, 2022, considered your request for an advisory opinion as to recent changes to the language of La. R.S. 42:1123(34) within the Code of Governmental Ethics (“Code”) as it applies to appointed members of the Lafayette Board of Zoning Adjustment.

#### **FACTS PROVIDED**

Pursuant to their authority in Section 7-07 of the Lafayette Consolidated Government (“LCG”) Home Rule Charter, the Lafayette City Council and the Lafayette Parish Council issued Joint Ordinance No. JO-043-2020, reorganizing the existing Board of Zoning Adjustment, which is comprised of five members and two alternate members. The Lafayette Mayor-Parish President appoints one member, while the Lafayette City Council appoints four members and the two alternates.

The Board of Zoning Adjustment has the power to hear and decide variances to the Comprehensive Zoning Ordinances pursuant to Article 4 of the Lafayette Development Code. All applications for variances are submitted initially to the Lafayette Community Development & Planning Department. Once the applications are reviewed, they are referred to the Board of Zoning Adjustment for hearing and decision. The Board of Zoning Adjustment also has the power to hear appeals regarding rezoning application decisions.

Applications involving the subdivision or resubdivision of property are submitted to the Lafayette Community Development & Planning Department. Once the applications are reviewed, they are referred to the Lafayette City Planning & Zoning Commission (“City Commission”), if the property is located in the City of Lafayette, or to the Lafayette Parish Planning & Zoning Commission (“Parish Commission”), if the property is located outside of the City of Lafayette.

The Board of Zoning Adjustment has no authority or jurisdiction over the subdivision or resubdivision applications. However, in the event the applicant wishes to request a variance in connection with a pending subdivision or resubdivision application, the variance application would be under the authority of the Board of Zoning Adjustment.

You ask whether members of the Board of Zoning Adjustment would be prohibited by the Code from submitting applications for subdivisions and/or resubdivisions. You also ask whether the provisions of R.S. 42:1123(34) would provide an exception to the Code for these purposes.

### **PROHIBITED TRANSACTIONS**

La. R.S. 42:1113B provides the following prohibition:

No appointed member of any board or commission, member of his immediate family, or legal entity in which he has a substantial economic interest shall bid on or enter into or be in any way interested in any contract, subcontract, or other transaction which is under the supervision or jurisdiction of the agency of such appointed member.

La. R.S. 42:1102(23) defines a “transaction involving the governmental entity” to mean:

Any proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other such particular matter which the public servant or former public servant of the governmental entity in question knows or should know:

- (a) Is, or will be, the subject of action by the governmental entity.
- (b) Is one to which the governmental entity is or will be a party.
- (c) Is one in which the governmental entity has a direct interest. A transaction involving the agency of a governmental entity shall have the same meaning with respect to the agency.

### **ANALYSIS**

Since applications for subdivision and/or resubdivision of properties are under the supervision or jurisdiction of the City Commission or the Parish Commission, the appointed members of the Board of Zoning Adjustment would not be prohibited by 1113B from submitting applications to either the City Commission or Planning Commission for the subdivision or resubdivision of property.

### **§1123(34) EXCEPTION**

The Louisiana Legislature created an exception to the Code for transactions involving subdivision and resubdivision applications in La. R.S. 42:1123(34). By Act 340 of the 2021 Regular Session, effective August 1, 2021, R.S. 42:1123(34) was amended and now provides that the Code shall not preclude:

A member of a municipal or parish governing authority, **an appointed member of a planning or zoning or appeals board or commission of a parish or municipality**, or a member of such public servant's immediate family **or a legal entity in which any such person has an interest** from making application for the approval of the subdivision or resubdivision of property and for the zoning of such property or for a building permit and any inspections performed pursuant thereto, **provided that all of the following:**

(a) subdivided property shall not be less restrictive than the zoning of the original parcel.

(b) The subdivision, resubdivision, or zoning of such property shall be for residential purposes only.

(c) The application or applications submitted by or on behalf of the public servant, a member of his immediate family, or legal entity, collectively, shall be limited to the subdivision, resubdivision, or zoning of not more than twelve lots per calendar year and the construction of not more than twelve residential units per calendar year.

(d) No public funds shall be used to construct any infrastructure for the use or benefit of such property or development.

(e) The public servant shall file written notice containing all details regarding the transaction deemed necessary by the Board of Ethics with his governing authority or board or commission and with the Board of Ethics no later than ten days prior to any hearing pertaining to any such application, or if no hearing is held pertaining to such application, shall file such notice at least ten days prior to final action on any such application.

(f) The public servant shall recuse himself from any vote related to such application and shall not participate in any other aspect of the application or transaction.

#### ANALYSIS

In the event an appointed member of the Board of Zoning Adjustment submits an application for subdivision or resubdivision that also requires a variance to be approved by the Board of Zoning Adjustment, **the exception in 1123(34) would allow the application, provided that all requirements of the exception are met, including that the subdivided property shall not be less restrictive than the zoning of the original parcel.** Appointed members of the Board of Zoning Adjustment would be prohibited by 1113B from submitting variance applications for all other situations that do not meet the requirements of the 1123(34) exception.

## PROHIBITED PARTICIPATION

You ask whether a prohibited transaction under 1113B would be cured by the recusal of the appointed member of the Board of Zoning Adjustment.

La. R.S.42:1112 provides:

A. No public servant, except as provided in R.S. 42:1120, shall participate in a transaction in which he has a personal substantial economic interest of which he may be reasonably expected to know involving the governmental entity.

B. No public servant, except as provided in R.S. 42:1120, shall participate in a transaction involving the governmental entity in which, to his actual knowledge, any of the following persons has a substantial economic interest:

(1) Any member of his immediate family.

(2) Any person in which he has a substantial economic interest of which he may reasonably be expected to know.

(3) Any person of which he is an officer, director, trustee, partner, or employee.

(4) Any person with whom he is negotiating or has an arrangement concerning prospective employment.

(5) Any person who is a party to an existing contract with such public servant, or with any legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent, or who owes any thing of economic value to such public servant or to any legal entity in which the public servant exercises control or owns an interest in excess of twenty-five percent, and who by reason thereof is in a position to affect directly the economic interests of such public servant.

**D. No appointed member of any board or commission, except as otherwise provided in R.S. 42:1120.4, shall participate or be interested in any transaction involving the agency when a violation of this Part would result.**

The recusal provisions are contained in La. R.S. 42:1120.4 as follows:

A. If any appointed member of a board or commission in the discharge of a duty or responsibility of his office or position, would be required to vote on a matter which vote would be a violation of R.S. 42:1112, he shall recuse himself from voting.

B. An appointed member of a board or commission who recuses himself from voting pursuant to this Section shall be prohibited from participating in discussion and debate concerning the matter.

Further, the exception in 1123(34) contains a specific requirement that the public servant shall recuse himself from any vote related to such application and shall not participate in any other aspect of the application or transaction.

As a result, the Board concluded that each appointed member of the Board of Zoning Adjustment must recuse himself from any discussion, debate, and vote on **any application** that comes before the Board of Zoning Adjustment in which a violation of any provision of Section 1112 may occur. The Board further noted that recusal as to an application for a variance that does not meet the requirements of 1123(34) does not cure a potential violation of the Code for appointed members of the Board of Zoning Adjustment.

### RESIGNATION

You ask whether the Code would require an appointed member of the Board of Zoning Adjustment to resign from their public position to avoid a potential violation of the Code.

The Board noted that the Code does not require resignation. Instead, an appointed member can choose not to undertake the conduct which would be a violation of the Code. However, if an appointed member of the Board of Zoning Adjustment chooses to resign in an attempt to prevent a potential violation of any provision of the Code, the post-employment restrictions of the Code will apply. Enclosed is an information sheet on the provisions. If a member has a question as to the application of these provisions to transactions with their former agency, they should seek an advisory opinion on the issue.

### CONCLUSION

The Board concluded, and instructed me to inform you, that, generally, appointed members of the Board of Zoning Adjustment are not prohibited by 1113B from submitting applications for subdivision or resubdivision of property to either the City Commission or the Parish Commission. However, in the event the subdivision or resubdivision application also requires a zoning variance to be approved, then the exception in 1123(34) would not prohibit the appointed member of the Board of Zoning Adjustment from submitting the variance request, **provided that all requirements of 1123(34) exception are met.** If the requirements of 1123(34) cannot be met, then the zoning variance would be prohibited by 1113B.

Additionally, the appointed member of the Board of Zoning Adjustment must recuse himself from any debate, discussion, or vote on any matter which would be a violation of Section 1112. Further, the public servant's recusal pursuant to 1120.4 does not cure a potential violation of 1113 where the requirements of the exception in 1123(34) are not met.

The Board further noted that with each of these questions, any analysis as to a specific public servant is highly fact specific as to whether a violation of the Code may occur. Each public servant should request an advisory opinion regarding their specific circumstances.

This advisory opinion is based solely on the facts as set forth herein. Changes to the facts as presented may result in a different application of the provisions of the Code of Governmental Ethics. Please note that the Board issues no opinion as to past conduct and that the Board's expressed opinion is limited to an examination of the Code of Governmental Ethics, the Campaign Finance Disclosure Act, the Lobbyist Disclosure Acts, and the conflict of interest provisions in the gaming laws.

If you have any questions, please contact me at (800) 842-6630 or (225) 219-5600.

Sincerely,

**LOUISIANA BOARD OF ETHICS**

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David M. Bordelon  
For the Board

**DISCLAIMER**  
This is a draft opinion and it is **NOT** an opinion of the Louisiana Board of Ethics.  
No party may rely on the facts or conclusions. The analysis and conclusions herein are provided for discussion purposes only, and are subject to change or revision at the meeting of the Board of Ethics at which this matter is considered.